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No. 88-507

In the Supreme Court of the United States

OCTOBER TERM, 1988

LUCIOUS WILLIAMS, ET AL., PETITIONERS

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners chalienge the court of appeals' ruling that the district court must vacate or modify a consent decree if it finds that new administrative regulations, promulgated pursuant to a new statute, fulfill the statutory mandate and protect the due process rights that the decree was entered to protect.

1. The Farmers Home Administration (FmHA) has the power under Section 502 of the Housing Act of 1949, 42 U.S.C. 1472, to authorize housing loans

to persons of low and moderate income in rural areas who cannot otherwise obtain credit at reasonable terms and rates. The FmHA assists borrowers through periods of hardship (see, *e.g.*, 42 U.S.C. 1475), but when it becomes clear that a borrower will not be able to repay the loan and cannot become a successful houseowner, the FmHA accelerates the loan and liquidates the borrower's account (7 C.F.R. 1955.15). In that event, the borrower either must sell the property to a third party and remit the funds to the FmHA or must convey the property directly to the FmHA. If the borrower does neither, then the FmHA forecloses on the debtor's property. See 42 U.S.C. 1480(d).

Prior to 1977, the FmHA in some locales used nonjudicial foreclosure procedures. In 1976, a class of Georgia recipients of Section 502 loans brought suit against the FmHA, claiming that the use of nonjudicial foreclosure procedures violated the Fifth Amendment's Due Process Clause, because such procedures failed to provide the mortgagor with personal notice and an opportunity to be heard and to present defenses (Pet. App. 2d). The FmHA settled the class action in 1977 by agreeing to a consent order that provided that the FmHA would use only judicial foreclosure procedures (*id.* at 3a-4a).

In 1978, Congress amended the Housing Act to require the FmHA to issue regulations giving Section 502 borrowers the right to written notice of the reasons for foreclosure, an opportunity to be heard and to present evidence, and the right to appeal to an authority who has the power to reverse the foreclosure determination. 42 U.S.C. 1480(g). The same year, the FmHA promulgated regulations providing for nonjudicial administrative foreclosure procedures.

Those regulations, which have been amended several times, provide a mortgagor with written notice, a hearing in which the mortgagor can present and contest evidence, and the right to appeal to an impartial hearing officer. See 7 C.F.R. 1900.51-1900.59.

In September 1986, the FmHA, responding to an opinion by the court of appeals (*Johnson* v. *United States Dep't of Agriculture*, 734 F.2d 774 (11th Cir. 1984)), asked the district court to modify the consent decree on the ground that the change in law effected by the 1978 statutory amendment, and the regulations that implemented the command of that amendment, were inconsistent with the consent decree. The district court refused to modify the consent decree (Pet. App. 1c-5c). It reasoned that the consent decree did not violate any "constitutional, statutory or decisional law" (*id.* at 3c) and did not cause extreme and unexpected hardship for the agency (*id.* at 4c-5c).

2. The court of appeals reversed and remanded to the district court (Pet. App. 1a-16a). Explaining that the district court had too narrowly construed its power to modify a consent decree in light of subsequent legislation (*id.* at 6a-9a), the court held that the 1978 amendment to the Housing Act was "a fully adequate basis upon which modification to a consent decree may be based" (*id.* at 12a). The court determined that the statutory amendment conflicted with the consent decree, at least as applied prospectively. It found that the decree deprived the FmHA of a choice between judicial and nonjudicial foreclosure procedures and that Congress, in its amendment to the Housing Act, intended that the FmHA exercise that choice itself, within the constraint of affording mortgagors due process (*id.* at 15a). The court ac-

cordingly remanded the case for the district court to review the FmHA regulations to determine whether they comport with constitutional due process and, if so, to modify the consent decree, at least in its prospective effects, to allow nonjudicial foreclosure (*ibid.*).

3. The decision of the court of appeals does not warrant review by this Court. To begin with, the judgment requires further proceedings in the district court. Under the court of appeals' order, the district court must determine whether the FmHA regulations conform to the requirements of due process. If the district court on remand finds that the regulations are invalid because they fail to meet constitutional standards, the consent decree will remain intact, and the question of when a consent decree may be modied will be rendered moot. Review by this Court at this time would therefore be premature.

On the merits, petitioners do not suggest that the decision of the court of appeals conflicts with any other decision of any other court of appeals, and their challenge presents no issue of general importance. Petitioners do not dispute that the district court erred in failing to acknowledge that it could amend the consent decree based on changes in the law; they contest only the standard for determining when a change in law permits modification of a consent decree and whether the statutory amendment in this particular case meets that standard. But the latter issue is a narrow one, and contrary to petitioner's suggestion (Pet. 22-25), there is no troubling lack of clarity in the standard that governs what type of change in law supports a modification of a consent decree. In *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651-652 (1961), the Court ruled that, if the statute and objectives on which the consent de-

cree was based are changed, the district court must be free to conform the decree to the new statute. That standard has not caused notable difficulties in application (see *Williams* v. *Atkins*, 786 F.2d 457 (1st Cir. 1986) (vacating a consent decree where changes to the Food Stamp Act undermined the statutory basis of the decree); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 968-971 (2d Cir. 1983) (discussing the standard for modifying a consent decree), cert. denied, 464 U.S. 915 (1983)); and there is no need for the Court to revisit the standard in order to protect the "worth and solemnity" of judicial decrees against the unchallenged power of Congress to redirect public policy (Pet. 23).

In any event, *System Federation No. 91* makes clear that the decision of the court of appeals is correct. In that case, a railroad employer had agreed by consent decree not to run a "union shop"—a workplace in which discrimination against or exclusion of nonunion members is permitted. Following the consent decree, Congress amended the Railway Labor Act, 45 U.S.C. 151 *et seq.*, to permit railroads to negotiate with unions about whether or not to have union shops. This Court held that the consent decree had to be modified; the Court explained that a change of law had rendered it "in conflict with the statutory objectives" (364 U.S. at 651) because the decree prohibited a choice that Congress intended that unions and railroads should have the power to make (*id.* at 648-653).

The present case is directly analogous to *System Federation No. 91*. There, the employer through a consent decree gave away its power to decide whether to run a union shop, but a subsequent statutory

amendment contemplated that the employer would have the power to decide that question (in conjunction with the union). Here, the FmHA through a consent decree gave up its power to foreclose through nonjudicial means, but the subsequent statutory amendment contemplated that the FmHA would have the power to choose between judicial and nonjudicial foreclosure procedures that meet certain statutory requirements. See 42 U.S.C. 1480(g) (granting the Secretary the power to issue procedural rules meeting certain requirements, not including a requirement of judicial foreclosure).* Just as in *System Federation No. 91*, the consent decree in this case deprived one party of authority that Congress later decided that it should have and so was inconsistent with statutory objectives.

Modification of the consent decree (if due process requirements are met by the new FmHA regulations) not only would bring the decree into line with statutory policy; it would impose no burden on petitioners and would leave the decree fully effective to fulfill its purposes. The decree was entered in order to guarantee the class members that the FmHA would abide by the requirements of due process in foreclosure actions. If the district court concludes that the regulations meet due process standards—which is the precondition for modification, as the court of appeals held (Pet. App. 15a)—the fundamental purpose of the consent decree will be fulfilled even if the decree is modified to permit the FmHA to use non-

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* As petitioners note (Pet. 9, 17-18), Congress was made aware of the present lawsuit in 1977. Although the consent decree providing for judicial foreclosure procedures was entered prior to the enactment of the 1978 amendments, Congress did not include any such requirement in the statute.

judicial foreclosure procedures. Accordingly, modification of the consent decree in the circumstances specified by the court of appeals would be a proper exercise of the inherent equity power to adapt a consent decree to changed circumstances, including changes in law. See *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976); *System Federation No. 91* v. *Wright*, 364 U.S. at 647; *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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